



DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Docket No. FTA-2016-0025

Notice of Buy America Waiver of Domestic Content Requirement for Minivans and Vans.

AGENCY: Federal Transit Administration, DOT.

ACTION: Notice of Buy America public interest waiver.

SUMMARY: In response to a formal petition from the Pace Suburban Bus Division of the Regional Transportation Authority (Pace) requesting a Buy America non-availability waiver to purchase 188 Dodge Caravan minivans for its vanpool program and informal requests from other FTA recipients for similar waivers, and because FTA has been unable to identify any minivan manufacturers who meet both the final assembly and domestic content requirements for non-ADA-accessible minivans, the Federal Transit Administrative (FTA) hereby waives its Buy America domestic content requirement for non-ADA-accessible minivans and vans. FTA's requirement for final assembly in the United States is not waived. This waiver applies to all contracts for the procurement of non-ADA-accessible minivans and vans entered into on or before September 30, 2019, or until a fully-compliant domestic source becomes available, whichever is earlier.

FOR FURTHER INFORMATION CONTACT: Cecelia Comito, Assistant Chief Counsel, Office of the Chief Counsel, phone: (202) 366-2217, or e-mail, Cecelia.Comito@dot.gov.

SUPPLEMENTARY INFORMATION:

FTA received a formal request from Pace for a Buy America non-availability waiver to purchase 188 Dodge Caravan minivans for its vanpool program. Minivans are considered rolling stock and are subject to the Buy America waiver set forth in 49 U.S.C. 5323(j)(2)(C), which requires that (i) rolling stock, including minivans, contain more than 60 percent domestic content, and (ii) final assembly of the vehicles occurs in the United States. Although initially Pace sought a waiver of only the final assembly requirement, Pace augmented its request to include a waiver of the domestic content and final assembly requirements. By way of background, Pace operates a vanpool program in the Chicago suburban area with more than 785 vehicles in service. A vanpool vehicle is defined, in pertinent part, as a vehicle with a seating capacity of at least six adults (not including the driver). *See* 49 U.S.C. §5323(i)(2)(C)(ii).

In October 2014, Pace issued an invitation for bid (IFB) for a five-year contract for the purchase of seven-person, non-ADA-accessible minivans. The successful bidder, Napoleon Fleet, Inc., proposed Dodge Caravan minivans, but certified that the vehicles were not compliant with the Buy America requirement because the vehicles are not assembled in the United States, but are assembled in Canada. On April 15, 2015, Pace petitioned FTA for a non-availability waiver to procure 188 Dodge Caravan minivans, believing that the vehicles would be able to meet the domestic content requirement.

In August 2015 and November 2015, however, Pace conducted pre-award Buy America audits of the Dodge Caravan minivans and discovered that the Dodge Caravan did not meet the current domestic content requirement of more than 60% US-made components. Pace informed FTA that the audit showed a 57.4% domestic content for 2015 model year minivans and a 52% domestic content for model year 2016 minivans.

Pace therefore expanded its request to a non-availability waiver on the grounds that no seven-person non-ADA-accessible minivan that complies with both domestic content and final assembly requirements was available.

In addition to Pace, FTA has received inquiries from other transit agencies and vanpool operators regarding the lack of available non-ADA-accessible minivans that meet both domestic content and final assembly requirements.

With certain exceptions, FTA's Buy America statute prevents FTA from obligating an amount that may be appropriated to carry out its program for a project unless "the steel, iron, and manufactured goods used in the project are produced in the United States." 49 U.S.C. 5323(j)(1). When procuring rolling stock, such as minivans, the cost of components and subcomponents produced in the United States for fiscal years 2016 and 2017 must be more than 60 percent of the cost of all components and subcomponents and final assembly of the rolling stock must occur in the United States.¹ 49 U.S.C. § 5323(j)(2)(C).

FTA funds the procurement of between 2,500 and 3,000 minivans annually, including both ADA-accessible vans and non-ADA-accessible vans. The challenges associated with buying minivans that comply with FTA's Buy America statute and regulations have been well documented over the past six years. In 2010, El Dorado National, Kansas and Chrysler Group LLC petitioned FTA for a waiver of the Buy America final assembly requirement. In response to the request, FTA published a notice in the Federal Register, seeking comment from all interested parties. Numerous parties responded to the notice expressing support for the waiver. One manufacturer, Honda,

¹ Under recent amendments to 49 U.S.C. 5323(j)(2)(C), the domestic content for minivans will increase in FY2018 and FY2019 to more than 65 percent and in FY2020 or beyond, the domestic content will increase to more than 70 percent.

indicated that its minivans were in compliance with the Buy America regulations but would not provide the additional information needed to support its claims. Ultimately, on June 21, 2010, FTA issued a public interest waiver of the Buy America final assembly requirement for all minivans and minivan chassis, but retained the domestic content requirement. *See* 75 Fed. Reg. 35123.

On November 27, 2012, following the introduction of the Vehicle Production Group's wheelchair-accessible MV-1 vehicle into the marketplace, FTA rescinded the waiver of final assembly for minivans, finding that the manufacturer of the MV-1 was a manufacturer of paratransit vehicles that could meet both the domestic content and the final assembly requirements for rolling stock under Buy America. *See* 75 Fed. Reg. 71676. Although FTA acknowledged that the MV-1 minivan is a wheelchair-lift equipped minivan and does not provide the seating capacity needed for vanpool programs, FTA did not continue the final assembly waiver for non-ADA-accessible vehicles, noting that it "prefers to consider waiver requests for limited circumstances and on procurement-by-procurement basis" *Id.*

On November 27, 2013, FTA issued a one-time, limited Buy America waiver of the final assembly requirement to the North Front Range Metropolitan Planning Organization (NFRMPO), for the purchase of 25 seven-passenger minivans, based upon non-availability. *See* 78 Fed. Reg. 71025. FTA rejected comments suggesting that it reinstate the 2012 blanket waiver for seven-person minivans, and instead issued a waiver for final assembly for NFRMPO's purchase of up to 25 minivans.

The market for non-ADA-accessible minivans has changed since 2013. In 2013, the Chrysler minivan met the domestic content requirements but was not assembled in the

United States. FTA issued a partial waiver for final assembly because more than 60 percent of the minivan's components were produced in the United States. According to Pace's pre-award audit of the Dodge Caravan, Dodge does not meet either Buy America requirement. However, there are at least four manufacturers – GMC, Ford, Honda and Toyota – that make non-ADA-accessible minivans or vans that are assembled in the U.S.²

In order to verify Pace's assertion that minivans are not available from a domestic source, on May 17, 2016, FTA published a notice in the Federal Register seeking public comment. In the notice, FTA stated that because there are at least four manufacturers who assemble their vehicles in the United States, FTA proposed issuing a general waiver of only the domestic content requirement for non-ADA-accessible minivans and vans. Final assembly for minivans still must occur in the U.S. FTA asked for comments from all interested parties regarding the proposed waiver and sought additional comments on whether manufacturers would consider submitting to a pre-award and post-delivery audit process conducted by FTA on each new model year, as opposed to requiring audits for each individual procurement.

Response to Comments

FTA received comments from 18 entities in Docket FTA-2016-0025 including a variety of transit agencies, national associations, vanpool operators, industry groups, state department of transportation, a manufacturer of electric passenger vehicles and buses, a research and development center, and the general public. Seventeen of the commenters expressed support for the waiver, recognizing the fact that non-ADA-accessible minivans

² This information is from the 2016 report submitted by car manufacturers to the National Highway Transportation Safety Administration (NHTSA) under the American Automobile Labeling Act. A copy of the report is posted on NHTSA's website at <http://www.nhtsa.gov>.

do not meet the domestic content requirement. Two commenters asked that FTA reconsider providing a waiver for final assembly and domestic content. One anonymous commenter opposed the waiver, believing that the waiver would give vanpool operators a benefit not available to traditional public transit agencies.

Commenters supportive of the waiver noted the consequences of the rescission of the 2012 waiver, including the following: minivans are being operated past their useful life since transit agencies are unable to use Federal funds to procure new minivans that are not Buy America compliant, agencies are procuring larger SUVs with less desirable access/egress characteristics compared to minivans, and vanpool programs are folding or failing to form because public transit agencies have been unable to purchase compliant minivans. Commenters supportive of the waiver also noted that vanpools provide an important transportation alternative both in large cities and rural regions and that the elderly and disabled who do not need an ADA-accessible van also benefit from vanpools.

The comments and questions can be categorized into the following primary categories:

A. What are the four minivans that meet the final assembly requirement?

Nine commenters asked that FTA identify the four minivans referenced in the May 2016 Federal Register Notice. These commenters noted that based on the 2016 American Automobile Labeling Act information provided on the National Highway Traffic Safety Administration's website, they identified six manufacturers of Multi-Purpose Vehicles (MPV). However, from the information provided on the website, they identified only two "true" minivans – the Toyota Sienna and the Honda Odyssey –and both of these are not currently certified by their respective manufacturers as meeting the

final assembly requirement. The commenters asked if FTA would identify the four minivans that it has determined meet the final assembly requirement.

FTA's Response:

Based on the 2016 American Automobile Labeling Act information provided on the National Highway Traffic Safety Administration's website, the four minivans FTA has identified that comply with the Buy America final assembly requirement are the GMC Acadia, the Ford Expedition, the Toyota Sienna and the Honda Odyssey.³

B. What other federal requirements must a manufacturer comply with?

Six commenters asked that FTA clarify what non-Buy America federal requirements a van manufacturer would have to comply with, such as those contained in FTA's Master Agreement, and if there are additional certifications that a manufacturer would have to make before the vehicles can be procured by transit agencies using FTA funds. One commenter asked why FTA does not specifically exempt vans and minivans from FTA's other compliance requirements since FTA already exempts "unmodified mass-produced vans" in the 4-year, 100,000-mile service life category from its Bus Testing regulations. This commenter proposed that FTA clarify that unmodified mass-produced vans and minivans having a projected annual production rate of 20,000 or more units are exempt from the Bus Testing regulation in the 4-year, 100,000-mile service life category, and are also exempt from other FTA compliance requirements, such as: civil rights, disadvantaged business enterprise, clean air, clean water and employee protections.

FTA's Response:

³ The definition of "minivan" used in this Notice is based solely on the vehicles' published seating capacity and should not be taken as FTA's endorsement of a vehicle's suitability for use in all FTA-funded van procurements or vanpool programs.

Today's FTA action is limited to the Buy America compliance of vans and minivans procured with FTA financial assistance. Compliance with the USDOT's civil rights, disadvantaged business enterprise, and environmental and employee protections is governed by other Federal and Departmental regulations that are beyond the scope of this Notice and are not within FTA's authority to waive. If commenters believe additional regulatory amendments are warranted, they may petition the USDOT, consistent with the procedures outlined in 49 CFR Part 5, subpart B.

C. Objection to the Proposed Waiver.

One commenter objected to the proposed waiver, stating that the vanpool industry is a small subsection of alternate commuting and that it appears that FTA and the U.S. Department of Transportation are working to assist less than .25% of those who commute daily to work. The commenter further stated that small vanpool companies are pushing a mandate to give options to government employees who should be choosing more efficient modes of travel such as larger vehicles. The commenter contended that minivans allow companies to push "maxing out" the subsidy to improve top line results and if true, these companies should be held to the same standards as municipalities receiving federal funds and adhere to Buy America.

Another commenter noted that there are manufacturers of zero-emission vehicles (ZEV) who manufacture vehicles in the United States that contain compliant levels of domestic content and that these ZEVs can be used for public transportation service (vanpool, car share, fleet replacement), and in order to provide zero emission vanpools, the commenter asks that FTA deny Pace's request for a waiver.

FTA Response:

FTA does not agree with this commenter that the proposed waiver would provide an undue advantage for individuals who commute by vanpool, noting that all public transit agencies are subject to FTA's Buy America requirements regardless of vehicle size, and those agencies are eligible to petition FTA for a Buy America waiver if faced with similar circumstances, regardless of the type of transportation they provide (i.e., heavy rail, light rail, commuter bus, transit bus, paratransit, or vanpool).

FTA believes that the ZEV vehicles currently available on the market are sedans that are not suitable for all forms of public transportation services. While ZEV sedans can be used to provide ADA paratransit and similar demand-responsive services to ambulatory patrons, they do not yet exist in a configuration capable of accommodating a rider who cannot transfer out of a wheelchair, and they do not provide a passenger capacity that meets the statutory minimum for a vanpool vehicle.

However, as FTA stated at the beginning of this Notice, the waiver is only valid until a vehicle that complies with both the domestic content and final assembly requirement is manufactured in sufficient quantities to meet the requirements of FTA recipients, or September 30, 2019, whichever occurs first. When a vehicle that meets both domestic content and final assembly becomes available, the manufacturer of such vehicles may petition FTA for a review of today's waiver.

D. Will FTA apply this waiver in the future to 9-15 seat passenger vans?

Five commenters asked if FTA would be willing to consider a similar waiver for 9-15 passenger seat vans, with one commenter noting that 9-15 seat passenger vans are essential to their program and compose a substantial part of their fleet.

FTA Response: A separate waiver for 9-15 passenger seat vans is not needed since the proposed waiver encompasses any mass produced, unmodified non-ADA-accessible vans, including 9-15 passenger seat vans.

E. Request for FTA to reconsider Pace's domestic manufacturer waiver request.

Pace asked that FTA reconsider its waiver request. Following Pace's request to waive the final assembly requirement, Pace expanded its request to include domestic content based on the pre-award audit Pace conducted. According to Pace's research, there are only two minivan manufacturers that are compliant with FTA's final assembly requirement—Honda's Odyssey and Toyota's Sienna – and Pace asserts that Honda and Toyota have not participated in FTA-funded procurements due to the audit requirements in 49 CFR part 663 that require the manufacturer to open its records for audit and inspection in order to confirm U.S. content of more than 60%. The unwillingness of these two potential vendors to document their domestic content would make it unlikely that the transit authority could ever successfully award an FTA-assisted contract to a minivan manufacturer who met the Buy America regulation's final assembly requirements. Pace also asserts that other minivan manufacturers, who cannot meet FTA's final assembly requirement, including: GM and Chevrolet, Ford, Dodge/Chrysler, Nissan, Kia, and Mercedes Benz, may be unable to document compliance with the domestic content requirement. Consequently, Pace amended its petition to request FTA

reconsider its request to expand the Buy America waiver to cover both domestic content and final assembly for non-ADA-accessible minivans.

FTA Response:

With regard to a manufacturer's willingness to document its compliance with the audit requirements, because today's Notice waives the domestic content requirement, recipients will not be obligated to document or audit a covered vehicle's domestic components. However, a recipient still must confirm a vehicle's compliance with the other requirements of 49 CFR part 663, including conformity to the original bid specifications, and compliance with all applicable Federal Motor Vehicle Safety Standards (FMVSS).

F. Comments on FTA's question whether manufacturers would consider submitting to a pre-award and post-delivery audit process that was conducted by FTA on each new model year, as opposed to requiring audits for each individual procurement.

Commenters were supportive of the concept of annual audits of vehicle models, rather than requiring audits for each individual procurement. Six commenters provided input on FTA's pre-award and post-delivery audit process question. None of the commenters were minivan manufacturers and commenters noted that while they could not speak on behalf of automakers, they supported any policy that would promote more entrants, more competition, and more options in the procurement of minivans for vanpool purposes.

FTA Response:

FTA believes this proposal has merit and will take this recommendation into consideration in a future action that FTA may take to address pre-award and post-delivery audits for minivan procurements. Until that time, however, recipients procuring vans with FTA financial assistance must still conduct pre-award and post-delivery audits, consistent with the statutory requirement at 49 U.S.C. 5323(m) and FTA's implementing regulation at 49 CFR part 663. Given the circumstances warranting this waiver, the audits will not need to document the domestic content of the vehicle for compliance, but will still need to confirm the place of final assembly. The audit will need to document that the vehicle conforms to the requirements outlined in the bid specifications, and complies with the FMVSS.

Conclusion:

Although no minivans are presently available in the domestic market that meet both the final assembly and domestic content requirements, FTA has identified four non-ADA-accessible vehicles that may be suitable for vanpool use that meet FTA's Buy America final assembly requirement. Therefore, FTA is providing a Buy America waiver of the domestic content requirement for non-ADA-accessible minivans and vans; final assembly in the U.S. is still required. This waiver is limited to contracts entered into on or before September 30, 2019 or until a fully-compliant domestic source becomes available whichever is earlier.

Additionally, FTA is granting Pace a one-time non-availability waiver of both domestic content and final assembly requirements for the purchase of up to 188 Dodge Caravan minivans for its vanpool program, as set forth in Pace's original request for a

waiver. Pace originally sought a waiver for the procurement of minivans for its vanpool program in April 2014, after the solicitation resulted in no bidders that certified compliance with Buy America. FTA requested that Pace re-advertise its procurement for minivans (IFB 412654), which Pace did in October 2014. The October 2014 solicitation also resulted in no bidders who could certify to both Buy America requirements. Pace has an immediate need for replacement vehicles for its vanpool program, and acquisition of these vehicles has been delayed due to the Buy America waiver review process. Therefore, FTA also is granting Pace a limited waiver of Buy America for the purchase up to 188 Dodge Caravan minivans for its vanpool program pursuant to IFB 412654.

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